IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 119

WILLIAM J. MURRAY, III, INFANT, BY MADALYN E. MURRAY, HIS MOTHER AND NEXT FRIEND, AND MADALYN E. MURRAY, INDIVIDUALLY,

Petitioners,

v.

JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS. M. RICHMOND FARRING, ELI FRANK, JR., DR. ROGER HOWELL, HENRY P. IRR, DR. WILLIAM D. McELROY, MRS. ELIZABETH MURPHY PHILLIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND CONSTITUTING THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY,

Respondents.

BRIEF OF ATTORNEY GENERAL OF MARYLAND, AMICUS CURIAE

THOMAS B. FINAN,
Attorney General,

JAMES P. GARLAND,
Assistant Attorney General.

ROBERT F. SWEENEY,
Assistant Attorney General.

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the State of Maryland in opposition to the granting of the Writ of Certiorari sought herein.

In addition to the separate political subdivision known as Baltimore City, there are 23 counties in the State of Maryland. Like Baltimore City each of those 23 counties

has a Board of School Commissioners whose duty it is to supervise the instruction and education of the children of this State residing in the particular county.

Article 6, Section 6, of the Rules of the Board of School Commissioners of Baltimore City, which is in question here, is applicable only within the geographic limits of that city. Subsequent to the decision of this Honorable Court in *Engel v. Vitale*, No. 468, October Term, 1961, decided June 25, 1962, the Office of the Attorney General of Maryland requested each of the various Boards of Education in this State to advise him whether or not opening exercises of a religious nature are held in the classrooms in those counties. From the responses to that inquiry it appears that no county in this State has a rule comparable to Article 6, Section 6, of the Rules of the Board of School Commissioners of Baltimore City, but that the practice of reciting either the Lord's Prayer or selected verses of the Scriptures is in use in every county of this State. Without exception, the practice is followed on a voluntary basis and those children who do not desire to participate are excused from so doing. This office is further advised that although in some instances pupils have requested to be excused, there have been no instances of objections being made to the practice of holding these religious exercises.

It is because of the statewide implication of the question presented in this case that this brief is presented on behalf of the State of Maryland in opposition to the petition for Writ of Certiorari.

JURISDICTION

The petitioners herein invoked the jurisdiction of the court under 28 U.S.C.A. 1257 (3).

This brief of the State of Maryland as Amicus Curiae is filed under authority of Supreme Court Rules, Title 28 U.S.C.A., Rule 27, 1, (d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves (1) Section 1 of the Fourteenth Amendment to the Constitution of the United States, (2) First Amendment to the Constitution of the United States, (3) Article 77, Sections 202 and 203 of the Annotated Code of Maryland (1957 Edition), Section 91 of Charter and Public Local Laws of Baltimore City (Flack 1949); (4) Article 6, Section 6 of Rules of Board of School Commissioners of Baltimore City, Amendment to Rule adopted November 17, 1960, (5) Article 77, Section 231, of Annotated Code of Maryland (1957 Edition).

All of these are set forth verbatim on pages 3, 4, and 5 of the petitioner's Certiorari Brief.

STATEMENT OF THE CASE

The Attorney General of Maryland adopts as the Statement of the Case herein the Statement of the Case as presented on pages 3, 4, 5, and 6 of the brief of the Respondents, James N. Curlett, et al.

REASONS FOR DENYING THE WRIT

The objections to the use of prayer or Bible readings or any devotional exercises in the public schools in Maryland have been based upon the initial prohibition of the First Amendment to the United States Constitution as made applicable to the States through the Fourteenth Amendment. The First Amendment, of course, prohibits the State from establishing any religion. In the landmark case of *Zorach v. Clauson*, 343 U.S. 306, 96 L. Ed. 954 (1952),

however, holding that the New York "released time" program was not a violation of the Constitutional establishment clause, Justice Douglas in viewing our fundamental policy toward religion said at page 313:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary . . . When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . ."

The decision of this court in *Engel v. Vitale*, supra, clearly prohibits the use in the public schools in this country of any prayer composed by a governmental agency. The Attorney General of Maryland joined in the brief of the Attorney General of Nevada as an amicus curiae in *Engel* and we accept the decision of this court in that case. We believe, however, that the principle, that this court in considering a constitutional question treats that question in its narrowest form, must apply to the decision in *Engel*. We see nothing in *Engel* which would reverse the broad principle of *Zorach*, quoted above. We see nothing in *Engel* which would deny to the citizens of this State, whose history, traditions, and founding are steeped in religious connotations, the right to have their children bow their heads in humility before the Supreme Being. We hope and believe that the decision in *Engel* is restricted, as indicated by Mr. Justice Black, to the point that:

> ". . . the constitutional prohibition against laws respecting the establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by Government."

Our thinking in this regard is bolstered by the language of Footnote No. 21 to the majority opinion, which recognizes that it would be proper to recite in school portions of historical documents such as the Declaration of Independence or verses of the Star Spangled Banner, our National Anthem, both of which include professions of faith in a Supreme Being. If it be proper to recite portions of the Declaration of Independence and of the Star Spangled Banner, acknowledging the existence of God, can it be improper to read passages from Scriptures — themselves historical documents and in fact the documents which were the cornerstone of the faith of the composers of the Declaration of Independence and the composer of our National Anthem?

It would be belaboring the obvious to point out that the decision of this court in *Engel*, supra, has caused widespread concern among many of the citizens of this country. That concern, we believe, stems from the apprehension that the decision in *Engel* is but the first in a series which would ultimately lead to the complete elimination of God from all of our institutions. We most certainly do not agree with those who would hold that the framers of the Constitution ever intended the First Amendment to be so construed nor do we believe that is or will be the opinion of this Honorable Court. We reiterate our belief that the holding of *Engel* is only that no governmental agency shall compose official prayers for any group of the American people to recite as a part of a religious program carried on

by Government. We believe the Maryland practice of reading from Scriptures, or of reciting a prayer so ancient that its origins are obscured in the mists of time, cannot be in contradiction of this rule.

Petitioners herein do more than ask for religious freedom. They ask that this court hold that the "religion" of secularism be adopted by this nation and the states comprising it. In the words of the nisi prius judge in this case, as quoted by the Respondents they "clamor for religious freedom, (but) their ultimate objective is religious suppression." His refusal to grant petitioners their objective was well founded, as was the decision of the Court of Appeals of Maryland in affirming that action.

CONCLUSION

For the reasons stated herein and for the reasons so well set out in the Respondents' brief, the Attorney General, on behalf of the State of Maryland, requests that the court not grant Certiorari in the instant case. We believe that the petitioners present no Federal question worthy of consideration by this court. We particularly request, however, in the event this court should find Certiorari should be granted, that we then be permitted to argue this case on the merits.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General

JAMES P. GARLAND,
Assistant Attorney General.

ROBERT F. SWEENEY,
Assistant Attorney General.